COURT OF APPEALS, DIVISION THREE, STATE OF WASHINGTON

GAIL S. HAMM,	)	**No. 27075-1-III**
	)	
Respondent,	)	
	)	
v.	)	
	)	
DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,	)	**Division Three**
	)	
	)	
Defendant,	)	
	)	
SAFEWAY, INC.,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J.—The trial court considered the same evidence heard by the Board of Industrial Insurance Appeals (Board) and reached the opposite conclusion from that of the Board. It was entitled to do so. The evidence, particularly the testimony of the treating physician, supports the trial court's determination. We thus affirm the order directing that Ms. Gail Hamm's claim for industrial insurance benefits be allowed.

FACTS

Ms. Hamm worked for Safeway in Moses Lake for nearly eight years before the July 23, 2003 incident that is the basis for this case. She was working as a meat wrapper and felt a sharp pain from her back to her stomach when she tried to lift a tray of meat from over her head to a counter. She went in a back room and fell down, holding her hands over her abdomen. Co-workers drove her to a hospital.

She told the emergency room physician, Dr. Lynn Flaherty, that she was having lower abdominal pain that "may have radiated a little bit to the back." Clerk's Papers (CP) 344. She reported having suffered similar, but brief, episodes in the preceding weeks. After testing, Dr. Flaherty suspected that Ms. Hamm suffered from a ruptured cyst in her uterus and recommended that she see a gynecologist.

The gynecologist, Dr. Daniel Phillips, performed diagnostic surgery and found no evidence of a ruptured cyst. He did note that she had a tight knot in a muscle in her back which was in spasm. He concluded she had a "degenerative discogenic disease with L5-S1 and degenerative spodyloarthrosis bilaterally." CP 267. He referred her to a neurologist, Dr. Nelson R. Cooke.

Dr. Cooke examined Ms. Hamm and ordered an MRI. It confirmed severe disc disease at L5-S1, disc dehydration, and a small broad-based disc at L4-5. His opinion

was that Ms. Hamm probably had an acute disc herniation which irritated her right L5 nerve root. He pursued a treatment plan that resulted in some improvement of the disc, but no improvement of her pain symptoms. While Ms. Hamm did not report the July 23 incident to him, Dr. Cooke was of the opinion that she had suffered an industrial injury on that date.

Dr. Barbara Jessen, a neurologist, examined Ms. Hamm on behalf of Safeway. Orthopedic surgeon Dr. Ivar Birkeland conducted the examination with Dr. Jessen. Based on their findings, Dr. Jessen concluded that Ms. Hamm had not suffered a work-related injury, although she did have a degenerative disease of the spine.

Ms. Hamm filed a claim with the Department of Labor and Industries (Department) for benefits resulting from an injury suffered while lifting a tray of meat on July 23, 2003. The claim was initially denied, but subsequently was allowed following the production of additional evidence. Safeway appealed to the Board.

The Board reversed the Department and directed that the claim be rejected. The Board placed great significance on the fact that "Ms. Hamm did not personally tell any physician that she hurt her back on July 23, 2003." CP 31. The Board concluded that Ms. Hamm did not establish that an industrial injury had occurred.

Ms. Hamm filed an appeal with the Grant County Superior Court. After a bench

trial *de novo*, the court concluded that Ms. Hamm had suffered an industrial injury. Critical to the court's determination was the fact that the treating physicians testified that she had suffered an industrial injury. Safeway then appealed to this court.

ANALYSIS

Safeway contends that the evidence does not support the trial court's factual determination and, instead, supports the Board's view of the facts. To that end, Safeway assigns error to 10 findings made by the trial court. We conclude that the evidence supports the trial court's findings and affirm its decision to grant benefits.

The superior court reviews a Board hearing *de novo*, but does not receive new evidence. RCW 51.52.115. The Board's findings are considered *prima facie* correct and the party challenging the Board's ruling bears the burden of showing that the evidence preponderates in its favor. *Id.*; *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). To that end, the fact-finder in the superior court trial is free to find evidence contrary to the Board's determination if it is convinced the evidence weighs in that direction. *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547, 550, 463 P.2d 269 (1969).

This court reviews the superior court's findings to see if they are supported by substantial evidence in the record. *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123,

128, 913 P.2d 402, *review denied*, 130 Wn.2d 1009 (1996). "Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

Much of Safeway's attack on the court's findings focuses on its theory of the case and the evidence that supported the findings of the Board. That, however, is not the test for adjudging the sufficiency of the evidence to support the findings that the trial court entered. The question is whether there was evidence that backed the trial court's findings, not whether there was competing evidence that should have been believed. We conclude that all of the court's findings are supported by testimony in the record. That evidence will not be detailed here because one finding is dispositive of this action.

Finding of fact 11 reads:

> Special consideration has been given to the opinions of the attending physicians, and I have given their testimony careful thought in light of the fact that neither doctor (Phillips and Cooke) was an expert hired to give a particular opinion consistent with one party's view of the case, and had multiple opportunities to meet with Ms. Hamm and to treat her. I believe their testimony to hold greater weight, based upon their reasoning, and based upon the fact they were not one-time examiners hired for that purpose or a brief encounter in an emergency room.

CP 453-454.

Washington courts give special consideration to the opinion of treating, as opposed to examining, physicians. *Hamilton v. Dep't of Labor & Indus*., 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *Groff v. Dept. of Labor & Indus*., 65 Wn.2d 35, 45, 395 P.2d 633

(1964); *Young*, 81 Wn. App. at 128-129. As explained in *Groff*:

> We are not saying that the trier of the facts should believe the testimony of the treating physician; the trier of the facts determines whom it will believe; but it should, in its findings, indicate that it recognizes that we have, in several cases, emphasized the fact that special consideration should be given to the opinion of the attending physician.

65 Wn.2d at 45.

Finding of fact 11 indicates that the trial court gave special consideration to the testimony of the treating physicians. It had the right to do so under long-established Washington case law. Dr. Cooke saw Ms. Hamm over a six-month period in which he diagnosed and treated her back injuries. He determined that her July 23, 2003 workplace injury more probably than not caused her back pain. Dr. Phillips saw Ms. Hamm on multiple occasions, was able to conduct surgery that disproved the ruptured cyst theory, specifically noted the back spasm problems that existed, and found the degenerative discogenic disease. This evidence, coupled with Ms. Hamm's testimony that she was injured trying to move the meat tray, is substantial evidence supporting the trial court's finding that Ms. Hamm was injured in the course of her employment.

The trial court could have, like the Board, focused on Ms. Hamm's lack of immediate complaint about a back injury and found she was not injured on the job. It was not required to do so. Instead, the court focused on the testimony of the treating physicians and believed that Ms. Hamm was injured in the course of her employment.

The evidence was sufficient to permit that determination.

The judgment of the trial court is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

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Schultheis, C.J.

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Brown, J.